Burruss Transfer, Inc. *and* Local Union 65, affiliated with the International Brotherhood of Teamsters, AFL–CIO.[1] Case 3–CA–15525

April 23, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On May 6, 1991, Administrative Law Judge Steven B. Fish issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this decision.

I. BACKGROUND

The judge found that the Respondent violated Section 8(a)(5) and (1) by refusing to provide the Union with requested financial information, by dealing directly with a unit employee, and by unilaterally granting a wage increase to that employee. The Respondent excepts only to the judge's finding that it unlawfully refused to provide the Union with the requested information. For the following reasons, we find merit in this exception and conclude that the Respondent did not violate Section 8(a)(5) and (1) by refusing to provide the information to the Union.

II. FACTS

The Respondent is engaged in the interstate moving and storage of household goods with a facility in Ithaca, New York. On September 14, 1988, the Union was certified as bargaining representative of the Respondent's drivers, helpers, packers, and warehouse and related employees.

In late September or October 1988, the Respondent's vice president, Clay Burruss, told employee Kirchgraber that he was no longer bitter about the election. Burruss said that the employees probably initiated the union campaign because they saw the warehouse the Company was constructing and assumed that the Respondent had money. Burruss explained that Cornell University was funding the construction and stated that had the employees known about the Respondent's lack of profit, they would not have started the ''whole Union thing.'' Burruss informed Kirchgraber that he could not afford to pay the employees any more than they were making. Burruss said that although he was willing to open his books to prove this fact, his attorney recommended against it.

In December 1988, the Union provided the Respondent with a proposed collective-bargaining agreement. This proposal included provisions for increased wages, insurance benefits, and payments to the Union's health and welfare and pension funds. When Burruss and his attorney subsequently met to prepare for negotiations, they decided the Respondent would not claim an inability to pay during bargaining.[3]

The parties held eight bargaining sessions between February and September 1989.[4] During the June 2 negotiating session, the Respondent submitted economic proposals to the Union. Burruss, the Respondent's chief spokesman in negotiations, explained that the Respondent's proposals—which largely mirrored existing benefits—were necessary to remain competitive in the area and the industry. Burruss explained that companies were coming into Ithaca and performing moving services with little more than advertisements in the yellow pages and that it was difficult to compete with them.

During the August 11 negotiations, the Union announced that it had a financial report showing that the Respondent could meet the Union's economic demands. Burruss responded that the Union probably obtained its information from Dun & Bradstreet. Burruss said that the Respondent's credit report would paint an entirely different picture and show that it was not paying its bills on time. Burruss also told the Union that although he liked its health and welfare proposal, he did not feel he could afford to pay it. He pointed out that he was already paying a 67-percent surcharge on his workmen's compensation insurance because of high claims. Burruss also said that to remain competitive, his proposal was the best he could do.

In the final bargaining session on September 8, Burruss repeated that he had to stay with his current plan to remain competitive. Burruss said that if he had to pay $98 for equipment and a crew, and the competition paid only $95, he would not be able to survive.

[1] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 363 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge erroneously stated in his analysis of the refusal-to-provide-information allegation that Burruss spoke to employee Kirchgraber in September 1989, rather than in September 1988. We correct this inadvertent error.

[3] Burruss testified that shortly after the election he learned that any claim of inability to pay in bargaining would entitle the Union, on request, to see the Respondent's books.

[4] All dates are in 1989 unless noted.

During the June 2, August 11, and September 8 bargaining sessions, Burruss repeatedly stated that the Respondent needed to remain competitive. He said he could not pay employees a higher hourly rate and overtime and remain competitive. Burruss also explained that one of its competitors, Mayflower, was coming to Ithaca and underbidding the Respondent. Burruss said it was a cutthroat business and that he could not understand how Mayflower could keep underbidding the Respondent and remain in business.

Burruss also said that he was already paying the same if not more than other area companies. Burruss explained that if he raised the hourly rate he would automatically have to charge customers more and could not stay competitive. Burruss repeatedly said during the final three negotiating sessions that there were other companies with lower rates making it difficult for him to stay competitive. Burruss challenged the Union to show him competitors who paid more than the Respondent.

After the final bargaining session, the Union met with the unit employees and decided it needed information to substantiate Burruss' claim that the Respondent could not pay more than it was offering. On September 19, the Union wrote Burruss asking that the Respondent provide it or its accountant with full information on the Company's financial standing and profits, including tax returns and supporting documentation for the previous 3 years. The Union pledged to keep the information confidential.

On September 27, the Respondent denied the Union's information request, stating that it was not claiming a financial inability to pay. The Respondent also stated that it did not believe its competitors were paying comparable wages or benefits, or incurring equal costs.

The Union did not request further bargaining, saying it would be difficult to bargain without the requested information. On September 25, the Respondent submitted a revised contract proposal to the Union which it described as its ''firm and final offer.'' The Respondent, however, also offered to meet if the Union wished.

III. ANALYSIS AND ARGUMENTS

A. *Judge's Findings*

On these facts, the judge found that the Respondent had a duty to provide the Union with the requested information under *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). The judge concluded that Burruss' claims of competitive disadvantage, and statements evidencing the Respondent's present and future financial distress, amounted to a plea of an ''inability to pay'' the Union's economic demands.

In reaching this conclusion, the judge relied on Burruss' assertion that he would ''not be able to survive'' if he had to pay $98 for equipment and crew when his competitors paid $95 for the same equipment and crew. The judge also considered significant Burruss' comment about not being able to afford the Union's health and welfare proposal, and his repeated statements that the Respondent's economic proposal was the best that it ''could do.'' Finally, the judge found that Burruss' August 11 statement that the Respondent's credit report would have painted a different picture from the favorable Dun & Bradstreet rating put in issue the present financial condition of the Respondent's operations.

Although the judge found that these comments by Burruss independently established that the Respondent was claiming an inability to pay in negotiations, he also found probative Burruss' September 1988 statement to employee Kirchgraber that he could not afford to pay employees any more than he was already paying. The judge concluded that the statement to Kirchgraber clearly demonstrated an ''inability to pay'' position, and clarified any ambiguity in Burruss' assertions during bargaining.

B. *Respondent's Exceptions*

The Respondent excepts to the judge's decision, arguing that it did not claim inability to pay during negotiations. The Respondent claims, inter alia, that it never stated that it would go out of business or reduce jobs if it acceded to the Union's economic demands; nor did Burruss ever state that it was operating at a loss. Instead, according to the Respondent, Burruss merely spoke ''truisms'' about the effect increases would have on the Respondent's competitive standing. *NLRB v. Harvstone Mfg. Corp.*, 785 F.2d 570, 576–577 (7th Cir. 1986).

The Respondent also argues that Burruss' comments to employee Kirchgraber demonstrate only that the Respondent knew prior to negotiations that it could not claim an inability to pay in bargaining. Finally, the Respondent contends that it is significant what was *not* said in negotiations. Thus, Burruss never discussed the Respondent's profitability; the Union never asked the Respondent if it could afford more; the Union did not request financial information during bargaining; and Burruss did not claim that the Respondent was losing money. Based on these factors, the Respondent contends that it was not required to provide the requested financial information to the Union.[5]

C. *Analysis*

We agree with the Respondent that neither the Respondent's conduct during negotiations nor Burruss'

[5] The Respondent also argues that the judge erred in rejecting its argument that this 8(a)(5) allegation was time-barred under Sec. 10(b) of the Act. *Machinists Local 1424 (Bryan Mfg. v. NLRB)*, 362 U.S. 411, 416 (1960). In view of our analysis of the 8(a)(5) allegation, discussed infra, we need not pass on the 10(b) issue.

statement to employee Kirchgraber triggered the duty to provide information under *Truitt*, supra. In reaching this result, we rely on *Nielsen Lithographing Co*., 305 NLRB 697 (1991),[6] which issued after the judge's decision.

In *Nielsen*, the Board found that an ''inability to pay'' under *Truitt* is not established by employer claims of ''competitive disadvantage'' or arguments that economic difficulties will result from agreements on the unions' terms. Rather, *Nielsen* makes clear that the duty to provide financial information under *Truitt* is triggered only where an employer claims it cannot *currently* meet union bargaining demands or cannot satisfy those demands *during the term of the contract being negotiated*. As stated in *Nielsen*, Supra at 700 ''[A]n employer's obligation to open its books does not arise unless the employer has predicated its bargaining stance on assertions about its inability to pay during the term of the bargaining agreement under negotiation.'' (Footnote omitted.)

Here, the Respondent's assertions do not raise a claim of present inability to pay. Throughout negotiations, Burruss did not even assert that the Respondent was losing money or claim that it was in imminent danger of closing if it acceded to the Union's bargaining demands. Instead, Burruss repeatedly stressed that the Respondent needed to remain competitive. Burruss complained that the Respondent was being undercut by competitors, that it had difficulty remaining competitive, and that it could not pay employees more and remain competitive. Under *Nielsen*, these claims of competitive disadvantage do not trigger the duty to provide the requested information.

Nor do the specific statements of Burruss on which the judge relied establish that the Respondent was claiming a present inability to pay. Thus, Burruss' repeated statements that the Respondent's economic offer was the best it ''could do'' was entirely consistent with the Respondent's expressed need to remain competitive. Additionally, Burruss' reference to the Respondent's unfavorable credit report, made solely in response to the Union's claim that it had a favorable financial report, was not tantamount to a claim that the Respondent could not meet the Union's economic demands during the life of the new agreement. Similarly, Burruss' statement that he would not be able ''to survive'' if he had to pay $98 when his competitors paid $95 for the same equipment and crew, was not a claim of present inability to pay. Rather, as found by the judge, this statement illustrated the effect the Union's proposal would have on the Respondent's claimed competitive standing.[7]

Burruss' statement that he did not ''feel that he could afford'' the Union's health and welfare proposal might suggest a present inability to pay. This statement however, is subjective and, particularly when considered in the overall context of bargaining, did not trigger a duty to provide information. Thus, throughout the bargaining session at which Burruss made this statement, he repeatedly stressed that the Respondent's proposal was the best it could do to remain competitive. Indeed, even after Burruss said he did not ''feel'' he could afford the Union's proposal, he again reiterated that the Respondent needed its proposal to remain competitive.

Finally, we do not find that the Respondent's persistent plea in negotiations of competitive disadvantage—or the need to remain competitive—was undercut by Burruss' statement the previous year to employee Kirchgraber that the Respondent could not afford to pay employees more than they were currently making. This informal comment was made to an employee rather than to the Union[8] and it was made 4 to 6 months before negotiations commenced, and even longer before the Respondent made an economic proposal that it justified as necessary for it to compete. In these circumstances, and noting particularly the Respondent's continual, limited claims of competitive disadvantage during bargaining, we do not find that this single comment outside a bargaining context substantially supports or triggered an obligation to provide requested information.

In sum, we do not find that the statements on which the judge relied or the record as a whole establish that the Respondent was asserting a present inability to pay during negotiations. Accordingly, we find that the Respondent was not obligated to provide the information the Union requested on September 19.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease

[6] In the underlying decision, the Board initially found that the employer was required to provide the union with the requested financial information. 279 NLRB 877 (1986). Following the employer's petition for review of this decision, and the Board's cross-petition for enforcement, the Seventh Circuit Court of Appeals set aside the Board's Order and remanded the case to the Board for further proceedings consistent with its decision. *Nielsen Lithographing Co. v. NLRB*, 854 F.2d 1063 (1988). The Board accepted the remand. After considering the court's opinion and the parties' briefs, the Board reversed its previous decision and found that the employer had not violated the Act by refusing to provide the information to the union.

[7] See generally *Concrete Pipe & Products Corp*., 305 NLRB 152 (1991). (Duty to provide information not triggered where employer claimed that to survive it had to remain competitive, and this meant lowering wages and benefits.) See also *NLRB v. Harvstone Mfg. Corp*., 785 F.2d 570 (7th Cir. 1986).

[8] Although more than 1 year after the comment was made Kirchgraber was appointed as an employee representative on the Union's bargaining committee and participated in the negotiation sessions, it is clear that, at the time of the conversation with Burruss, Kirchgraber had no official role or position with the Union.

and desist and to take certain affirmative action designed to effectuate the policies of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Burruss Transfer, Inc., Ithaca, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with the Union by dealing directly with employees concerning terms and conditions of employment.

(b) Refusing to bargain in good faith with the Union by unilaterally granting wage increases or otherwise changing terms or conditions of its employees, without notifying, consulting, or bargaining with the Union as the exclusive representative in the appropriate unit set forth below.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with Local Union 65 as the exclusive representative of the employees in the following appropriate unit:

> All full-time and regular part-time local drivers, local driver helpers, short haul drivers' helpers, packers, warehousemen and any other employees who perform such work, employed by the Employer at its Route 13 and Lower Creek Road, Ithaca, New York location; excluding office clerical employees, guards, supervisors and all other employees excluded under the National Labor Relations Act.

(b) Post at its facility in Ithaca, New York, copies of the attached notice marked ''Appendix.''[9] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps have been taken to comply with this Order.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relation Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with Local Union 65, affiliated with the International Brotherhood of Teamsters, AFL–CIO as the exclusive collective-bargaining representative for employees in the bargaining unit described below.

WE WILL NOT refuse to bargain in good faith with the Union by dealing directly with our employees concerning terms and conditions of employment.

WE WILL NOT refuse to bargain in good faith with the Union by unilaterally granting wage increases or otherwise changing terms and conditions of employment of our employees in the unit, without notifying, consulting or bargaining with the Union as the exclusive representative of our employees. Nothing here shall require that we rescind any wage increase that we have previously granted.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain in good faith with Local Union 65 as the exclusive representative of our employees in this appropriate unit:

> All full-time and regular part-time local drivers, local driver helpers, short haul drivers' helpers, packers, warehousemen and any other employees who perform such work, employed by the Employer at its Route 13 and Lower Creek Road, Ithaca, New York location; excluding office clerical employees, guards, supervisors and all other employees excluded under the National Labor Relations Act.

BURRUSS TRANSFER, INC.

Michael J. Israel, Esq., for the General Counsel.
Jeffrey A. Tait, Esq. (O'Connor, Gacioch & Pope), of Binghamton, New York, for the Respondent.
James N. McCauley, Esq., of Ithaca, New York, for the Charging Party.

DECISION

STEVEN B. FISH, Administrative Law Judge. Pursuant to charges filed on March 22, 1990, by Local Union 65, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union or Local 65), the Regional Director for Region 3 issued a complaint and notice of hearing on May 8, 1990, alleging in sub-

stance that Burruss Transfer, Inc. (Respondent) violated Section 8(a)(1) and (5) of the Act, by failing and refusing to supply the Union with information, and by bypassing the Union and offering and granting a wage increase to an employee in the bargaining unit without notice to or bargaining with the Union concerning such increase.

The trial with respect to the allegations set forth in the above complaint was held before me on June 12, 1990, in Ithaca, New York. Briefs have been received from counsel for the General Counsel and Respondent, and have been carefully considered.

Based on the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation, with an office and place of business in Ithaca, New York, is engaged in the interstate transportation and storage of household goods. Annually, Respondent derives gross revenues in excess of $50,000 from customers located outside the State of New York for the interstate transportation of household goods. It is admitted and I so find that Respondent is now, and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted and I so find that the Union is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

On September 14, 1988, the Union was certified as the collective-bargaining representative of Respondent's employees in a unit consisting of drivers, helpers, packers, and warehousemen employed by Respondent at its Route 13 and Lower Creek Road location in Ithaca, New York.

In late September or early October 1988, Clay Burruss, Respondent's vice president, called employee Mark Kirchgraber into Burruss' office. Burruss told Kirchgraber that he was over being bitter about the election results, and there were no hard feelings. Burruss added that the employees probably initiated the union drive because Respondent was building a new warehouse and were under the assumption that it was company money. He informed Kirchgraber that in fact Cornell University had paid for the warehouse, and that the employees' impression on that Respondent was making a lot of money was false. Burruss then explained that if Kirchgraber and the employees had known about Respondent's lack of profit, they would not have started the ''whole Union thing.''

Burruss also informed Kirchgraber that Respondent could not afford to pay the employees any more that it was paying currently. Burruss added that he would be agreeable to open his books and show the Union that he could not afford to pay any more, but that his lawyer had recommended against it.[1]

In December 1988, Union President and Business Agent James Augst met with the bargaining unit employees and prepared a list of initial proposals. Additionally, Augst appointed Kirchgraber to be the employee representative on the bargaining committee, and to be a participant in negotiation sessions.

On December 21, 1988, Augst sent Respondent a covering letter, with a copy of a proposed collective-bargaining agreement. The letter also indicates that the Union will be contacting Respondent to set up dates for negotiations. The proposed contract provided for a 15-percent wage increase in the first year of the contract, and 5-percent raises in each of the next 2 years, payments into the Union's Health and Welfare and Pension Fund, plus other increases in benefits. According to Clay Burruss, he met with his attorney to prepare for negotiations, shortly thereafter. Burruss further asserts that soon after the election, he had been informed by his attorney that if he made statements at the bargaining table that he was unable to pay more, the Union could successfully request to see his books. Thus in December, Burruss claims that when he and his attorney met, they decided that he would not claim an inability to pay during the negotiations.

Between February and September 1989, the parties met eight times at the Ramada Inn in Ithaca for negotiations. Various individuals were present on behalf of both sides at various sessions, but Burruss and Augst were the chief spokespersons for their respective parties. During these sessions, Respondent submitted counterproposals to the Union's demands, the parties discussed all issues, and agreements were reached on some items, including union security, checkoff, grievance procedure, funeral leave, holidays, and sick days. However, in the major economic issues such as wages, pension, and health and welfare plans, no agreements were reached. Respondent essentially proposed maintaining its existing wages and benefit programs.

In justifying Respondent's adherence to its own proposals, as well as its refusal to agree to the Union's major economic demands, Burruss consistently made reference to Respondent's need to remain ''competitive.'' Burruss would phrase Respondent's position in this regard in slightly different fashions, but continually based its economic proposals and positions on its need to be ''competitive.'' Thus, Burruss would state, ''in order to remain competitive in the area and in the industry, this was the economic proposal that was needed.'' Burrusss would refer to other companies coming into Ithaca and underbidding Respondent for jobs, and adding in order to compete with these forms, this proposal was necessary for Respondent. At times, Burruss told the union negotiators that he couldn't give the employees any more money or pay any more hourly, plus pay overtime after 8 hours or 48 hours and stay competitive.

Burruss also continued to insist throughout the negotiations, that Respondent was already paying more money to its employees than his competitors, and he did not see the need to pay any more to the employees. Burruss also challenged the Union to show him any of Respdonent's competitors that paid more to its employees. Burruss mentioned some specific competitiors that were underbidding Respondent on jobs, and commented that he ''couldn't understand how these companies'' could afford to keep on doing that and stay in business in Ithaca.'' Burruss added that if he were to grant the wage increases asked for by the Union, he would have raised his rates for local moves, charge his customers' work, and ''wouldn't be able to stay competitive.''

[1] The above is based on the unrefuted testimony of Kirchgraber.

At the August 11 negotiation session, Augst asserted that a financial report prepared by the Union's economic department on Respondent demonstrated that Respondent could meet the Union's demands, because the report reflected that Respondent was doing well and showed growth.

Burruss replied that ''his proposal was the best that he could do in order to remain competitive in the area.'' Burruss added, however, that he felt that the Union had probably gotten its information from Dun & Bradstreet, but if the Union had gotten Respondent's credit report, ''it would have painted a different picture.''

At that same meeting, the parties discussed the Union's Health and Welfare Plan. Burruss indicated to the Union that he liked the Union's plan, and thought it was a good plan, but he ''didn't feel that he could afford to pay that.'' Burruss added that he was already paying a 67-percent surcharge on his workmen's compensation insurance. When wages were mentioned at the August 11 meeting, Burruss again replied that in order to remain competitive in the area, his proposal was the best that they could do.

At the final session, on September 8, 1989, the parties went over each and every item in their respective proposals, and determined which issues had been tentatively agreed to, and which areas were still in dispute. When the major economic areas such as wages and benefits came up, once again Burruss talked about the competitive nature of the industry, and the problems Respondent was facing of being underbid by companies coming in from outside Ithaca. Burruss at that point gave an example of the effect of competition, vis a vis the Union's proposals. He related that if he had to pay $98 for equipment and a crew, when the competition was only paying $95 for the same equipment and the same crew, he ''would not be able to survive.''

The meeting ended on that note, without any further scheduling of any additional sessions. My findings with respect to the discussions at the bargaining sessions is based on a compilation of the credited testimony of Augst, Kirchgraber, Burruss, and James McCauley, the Union's attorney. I note that Burruss did not deny telling the Union that Respondent ''couldn't afford to pay'' the amounts necessary to fund the Union's medical plan, or that if the Union had obtained a credit report on Respondent, ''It would have painted a different picture.'' Burruss also did not deny furnishing the Union with an example of the effect of competition on operations, including making the comment that ''he would not be able to survive,'' in connection with describing a situation where his Company would be constantly bidding against other companies, with lower costs for equipment and crew.

Shortly thereafter, the union representatives met with the employees to discuss its next step. The Union decided as a result of this meeting that it wanted some substantiation of Respondent's position that in order to remain competitive in the area, it could not pay any more that it was offering. The Union did not make the request sooner, because it felt that Respondent would make some movement on the major economic issues. Since Respondent had not done so, the Union decided to request information from Respondent to support its position. Thus, the Union sent the following letter to Respondent:

September 19, 1989
Mr. Clay Burruss,
Vice President
Burruss Transfer, Inc.
Route 13 & Lower Creek Road
Ithaca, New York 14850

Dear Mr. Burruss:

During our negotiations, you stated that the Union's economic proposals, including its proposals regarding wages, health and hospital benefits, and the establishment of a pension plan, were financially onerous to the Company. You have said that you were financially unable to provide wages and benefits in excess of what you have offered and that doing so would render you unable to remain competitive and to stay in business.

Neither the Union nor the employees want Burruss Transfer to go out of business, but neither are the employees willing to accept an economic package such as you have offered without a compelling reason to do so. Accordingly, the Union requests that you make available to it, or to an accountant(s) selected by it, full and complete information with respect to the Company's financial standing and profits, including the Company's income tax returns for the three most recent years with all supporting documentation and records pertaining thereto. This information is essential for us to make a determination on how to proceed on these issues.

Recognizing the confidential nature of this information, the Union agrees not to disclose it to outside third parties, including competitors of the Company.

Please contact me at your earliest convenience so that we can establish a mutually agreeable time and work out the mechanics involved.

Respectfully,
James E. Augst
President & Business Agent
Teamsters Local 65

By letter from its attorney, dated September 27, Respondent replied to the Union's letter, as follows:

September 27, 1989

James E. Augst, President
Teamsters Local Union No. 65 CERTIFIED MAIL
701 West State Street P 067 23k6 446
Ithaca, New York 14850-3390

Re: Burruss Transfer, Inc.
Our file: 2771

Dear Jim:

I am writing in response to your letter of September 19, 1989.

Burruss Transfer, Inc., did not, and does not, claim it is financially unable to pay wages and benefits in excess of its proposal. We believe that overall our proposal, which includes increased benefits, both economic and non-economic is a fair and reasonable one.

What we have repeatedly made clear during negotiations is that we believe our competition is not paying wages or benefits nor are they incurring costs equal to those of Burruss Transfer, Inc. We have specifically re-

ferred to certain competitors who compete in the Ithaca area without maintaining an office in the area. We have specifically referred to employees who have returned to work at Burruss Transfer, Inc., after working for other trucking companies.

We will not, therefore, produce the data you request. It is not pertinent to negotiations.

Very truly yours,
JEFFREY K. TAIT

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Additionally, on September 25, 1989, Respondent's attorney sent a letter to the Union's attorney, along with a copy of Respondent's revised last proposal. The letter characterized this proposal as ''the employer's firm and final offer,'' but offered to meet and negotiate further with the Union if desired.

The Union did not seek any additional meetings, since it did not wish to make any more concessions on economic issues without some substantiation of Respondent's claim that it needed something less than what was being proposed in order to remain competitive.

In mid-February 1990, Robert Spry, a driver employed by Respondent, came to Burruss and asked for a raise. He informed Burruss that he had been away from home a lot on long hauls, and thought that he deserved more money. Burruss replied that he would have to check with his lawyer and the Union.

A few days later, Burruss spoke to Spry, again about the raise, and they discussed whether Spry should wait for the raise until June, or receive a raise immediately of slightly less money. Spry opted for an immediate and smaller raise, which Spry received a week later.

Burruss admitted that he did not contact the Union about the raise, nor notify it about the fact that he had granted the increase to Spry. According to Burruss, he did not do so because he had not heard from the Union in over 5 months, and the parties had discussed during negotiations a clause proposed by Respondent that permitted it to grant wage increases higher than the contract rate.[2]

Burruss asserts that he relied on this proposal to grant the wage increase, although there is no indication that the Union agreed to this clause, much less to the terms of the overall contract as submitted by Respondent.

II. ANALYSIS

A. *The Refusal to Supply Information*

Where an employer, either in response to bargaining demands from the Union, or in support of its own proposals, makes a claim of inability to pay, the duty to bargain in good faith requires it to provide requested financial information to substantiate its claim. *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956). In order to invoke the application of *Truitt*, it is not required that the employer make an express plea of poverty, nor that it use any magic words to convey its inability to pay. *Clemson Bros*., 290 NLRB 944 (1988); *Atlanta Hilton & Tower*, 271 NLRB 1600, 1602 (1984).

What is required, is that the Employer's words and conduct specifically link its bargaining position to economic hardship. *E. I. du Pont & Co*., 276 NLRB 335, 336 (1985); *Clemson Bros*., supra. The critical distinction to be made is whether the employer's position is reasonably interpreted as expressing an inability to pay or an unwillingness to do so. *New York Printing Pressmen v. NLRB*, 496 F.2d 496, 500 (2d Cir. 1976); *Advertisers Mfg. Co*., 275 NLRB 100 (1985); *Atlanta Hilton*, supra.

The Board has considered the question of whether an Employer's assertion of competitive disadvantage, either singly or in conjunction with other conduct, gives rise to an obligation under *Truitt* to supply information in numerous cases. Unfortunately, an analysis of these decisions reveal that the Board's view of these assertions has not been a model of consistency or clarity. Thus in *Peerless Distributing*, 144 NLRB 1510, 1514 (1963), the Board concluded that a plea of competitive disadvantage is equivalent to a plea of inability to pay.

> We are in agreement with the Trial Examiner, however, that the Respondent violated Section 8(a)(5) of the Act by its refusal to furnish the financial information requested by the Union. The Respondent refused to grant the Union any wage increase or other economic benefits on the ground that it had to remain ''competitive,'' and also refused all the Union's requests for financial information. As the Supreme Court has held, ''bargaining lacks good faith when an employer mechanically repeats a claim of inability to pay without making the slightest effort to substantiate the claim.'' The Respondent contends that it was not claiming financial inability to grant economic concessions, but merely that it could not grant them and remain competitive, and that it was therefore not obligated to give the Union data as to its financial status. We do not agree. The Respondent's argument that it was not pleading inability to pay, but only that it desired to remain competitive, is self-contradictory. Thus, if granting economic benefits would, according to the Respondent, have the effect of reducing its competitiveness, it follows that the Respondent was asserting its financial inability to grant economic benefits. Moreover, if the Respondent had furnished the relevant data, the Union might have been able to show that the Respondent could grant a wage increase and still remain competitive, or, in the alternative, the Union might willingly have reduced its demands. Any such resolution of the major economic issues was precluded by the Respondent's intransigence in this matter. Accordingly, we find that, by refusing to furnish the Union with the pertinent financial information requested, the Respondent violated Section 8(a)(5) of the Act. [Fns. omitted. Id. at 514.]

This decision, which cited a previous Board holding in *Cincinnati Cordage & Paper Co*., 141 NLRB 72, 77 (1963), to the same effect, was followed in a number of subsequent decisions, and affirmed by various courts of appeal. *Coltex Corp*., 146 NLRB 48, 54 (1964), enfd. 364 F.2d 552, 554 (5th Cir. 1966); *Palomar Corp*., 192 NLRB 592 (1971),

[2] The actual proposal allows Respondent to pay more than the amounts provided for in the agreement, provided that such amounts are not paid to discriminate against any employee in violation of law or by reason of union activity.

enfd. 465 F.2d 731, 734 (5th Cir. 1972). *Goodyear Aerospace Corp*., 204 NLRB 831, 837 (1973); *Stanley Building Specialties Co*., 166 NLRB 984, 985 (1967), enfd. 401 F.2d 434, 436 (D.C. Cir. 1968), where soon to be Chief Justice Burger wrote as follows:

> The Company asserts that a claim of inability to pay is not shown when the Company claims that the increases will prevent it from competing. But the inability to compete is merely the explanation of the reason why the Company could not afford an economic benefit. . . . claims of the need to remain ''competitive'' have been equated to claims of inability to pay for the purposes of creating an obligation to provide economic data.'' [Fns. omitted. Id. at 436.]

See also *Western Wirebound Box Co*., 145 NLRB 1539, 1545 (1964), enfd. 356 F.2d. 28, 91 (9th Cir. 1966); and *International Telegraph & Telephone Co*., 159 NLRB 1757, 1758 (1966), enfd. 382 F.2d 366 (3d Cir. 1967), where the Board approved administrative law judge's decisions which held that even though a claim of competitive disadvantage, may not be a claim of inability to pay, the rationale of *Truitt*, supra, i.e., honest claims made during bargaining must be supported, warrants disclosure of financial information. The Ninth Circuit in enforcing *Western Wirebound*, supra, observed, after discussing *Truitt* that, ''We see no reason why, under the same rationale, an employer who asserts that competitive disadvantage precludes him from acquiescing in a union wage demand, does not have a like duty to come forward, on request, with some substantiation.'' 356 F.2d at 91.[3]

Apart from and seemingly unconcerned with the above-cited authority, the Board developed another line of cases which appears to now represent the Board's current position with respect to statements of competitive disadvantage vis a vis *Truitt*. Thus in *Taylor Foundry Co*., 141 NLRB 765, 766–767 (1963), enfd. 338 F.2d 1003 (5th Cir. 1964), the employer asserted that it could not afford an increase in labor costs and remain in a competitive position. The Board observed as follows:

> While it is readily understandable that an increase in operating costs may place an employer in a disadvantageous position with respect to his competitors and that a mere assertion thereof is not necessarily a claim of inability to pay calling for some substantiating proof under *N.L.R.B. v. Truitt Mfg. Co*., we are satisfied that Respondent went beyond asserting such a position. Respondent's situation, as testified to by his son, was that ''if we so increased our labor costs that we would lose a margin of profit that we have and we can't exist.'' [Emphasis supplied.] In our opinion, this assertion to the effect that Respondent would have to go out of business if he gave a wage increase amounts to a clear claim of financial inability in the premises.
>
> Admitting the possibility that its wage demand might be excessive, the Union advised Respondent that the Union would have to have some information from the Respondent in support of his claim that he could not afford to pay any wage increase if the Union were to reduce its wage demand. This information the Respondent refused to furnish. All he offered was information comparing his own wage scales or prices with his competitors, but this, without more, was scarcely sufficient to satisfy the Union's request for evidence bearing on the Respondent's asserted inability ''to exist'' if he granted a wage increase. We find that, by refusing to furnish the requested information on and after January 9, 1962, the Respondent failed to bargain in good faith and thus he violated Section 8(a)(5) and (1) of the Act. [Fns. omitted. Id. at 767.]

Interestingly, the court of appeals in *NLRB v. Western Wirebound Box*, supra, 356 F.2d at 91, in enforcing the Board Order therein, opined that the Board had changed its view since Taylor, and that the Board according to that Court, was no longer following *Taylor*. While as noted above there was considerable support for the court's view in its assessment of the continuing viability of *Taylor*, subsequent cases reveal as will be demonstrated that the position taken in *Taylor* represents the current Board position in this area.

In *Charles E. Honaker*, 147 NLRB 1184, 1187–1188 (1964), the Board again considered an assertion by an employer that no wage increase was warranted, because it intended to ''remain competitive.'' The Board concluded that the employer had not pled inability to pay, and was under no obligation under *Truitt* to provide financial data to the Union.[4] However, the Decision also stated: ''if, for example Respondent meant by its use of the phrase to remain competitive that a wage increase would force it to raise its prices over those of its competitors and hence result in a loss of business, we would agree with the Trial Examiner that, in effect, Respondent was pleading inability to pay.'' Id. at 1188.

In *Empire Terminal Warehouse Co*., 152 NLRB 1356, 1360–1361 (1965), affd. 355 F.2d 842, 845 (D.C. Cir. 1966), the Board affirmed an administrative law judge's recommendation that an employer's position on wage increases, that it was placed at a competitive disadvantage and was therefore unable to get more business, because it was paying substantially more in wages than its competitors, was not a plea of inability to pay under *Truitt*. I would note that the administrative law judge cited *Taylor*, but that neither the judge nor the Board made any reference to *Peerless*, although the administrative law judge did attempt to distinguish *Cincinnati Cordage*, supra.

While some subsequent cases continued to adhere to the view expressed in the *Peerless* line of cases that a plea of noncompetiveness is equivalent to plea of inability of pay, *Hiney Printing Co*., 262 NLRB 157, 162 (1982); *American Model & Pattern*, 277 NLRB 176, 184, (1985), I note that

[3] See, however, *United Fire Proof Warehouse v. NLRB*, 356 F.2d 494, 498 (7th Cir. 1966), where that court reversed the Board's decision in *Boulevard Storage & Moving Co*., 152 NLRB 539, 541 (1965), which had equated a plea of an inability to grant a wage increase and remain competitive with an inability to pay under *Truitt*, citing *Peerless* and *Cincinnati Cordage*, supra. The court found that the employer had not pled inability to pay, and that ''where the evidence disclosed won't, the Board found can't.''

[4] I note that the Board reversed the decision of the administrative law judge who had found a violation citing *Peerless* supra. The Board made no attempt to distinguish *Peerless* nor did it overrule that decision which appears to be clearly contrary to the Board's action in *Honaker*.

these cases also included other conduct and statements by the employers as in Taylor that indicated a plea of poverty. (In *Hiney* the Employer stated that it might close if it did not obtain contract relief.) (In *American Model* the Employer stated that it could not afford to pay existing wages and it was in a bad financial position).

In *Harvstone Mfg. Corp*., 272 NLRB 939 (1984), the Board affirmed without comment an administrative law judge's decision that a *Truitt* obligation arose in the context of a plea by the employer of a need to remain competitive. The administrative law judge's did make reference to other remarks by the employers concerning the possibility of going out of business and the loss of jobs, and cited both *Taylor* and *Peerless* as well as many of the other cases cited above, in finding that the employers were pleading inability to pay. The Seventh Circuit reversed the Board in *NLRB v. Harvstone Mfg*., 785 F.2d 570, 575–577 (7th Cir. 1986) (rehearing and rehearing en banc denied April 10, 1986). The circuit court's opinion refers to the fact that the Board's counsel conceded in oral argument that the Board apparently no longer subscribes to the view expressed in *Peerless* and *Cincinnati Cordage* that a claim of competitive disadvantage was itself a plea of inability to pay.[5]

The court dismissed the Board's reliance on statements made by the employers concerning the possibility of going out of business as ''nothing more than a truism.'' The court majority concluded that the relevant time period for consideration is the term of the new collective-bargaining agreement, and such statements by employers do not preclude an employer from asserting that it could afford the increased wages at that time. Thus it was felt that the employers were expressing an unwillingness rather than an inability to pay, by claiming competitive disadvantage.

Subsequent to the court's *Harvstone* opinion, the Board has been careful not to adhere to the per se approach of *Peerless* and its progeny, and although the Board has not overruled *Peerless* or any of the numerous cases which followed the rationale therein, it is apparent that the Board no longer subscribes to that view. *Buffalo Concrete*, 276 NLRB 839, 841 (1985), enfd. in relevant part 803 F.2d 1333, 1339 (9th Cir. 1986), *E. I. du Pont*, supra at 336; *Armored Transport of California*, 288 NLRB 574, 575 (1988).

Thus the Board will consider claims of competitive disadvantage made by an employer, in the context of other conduct and statements of the employers, to determine whether such employer is asserting an inability or mere unwillingness to pay. In this connection, the following examples of employer statements has been deemed sufficient, to transform a claim of competitive disadvantage into a claim of inability to pay. *Nielsen Lithographic Co*., 279 NLRB 877, 879 (1985), revd. and remanded 854 F.2d 1063 (7th Cir. 1988) (statements made during negotiations and in letter to employees by employer, ''that business was being lost to competitors;'' ''they would have a worse problem in the future'': ''to survive, we must be able to compete. Our business and our jobs are at stake if we cannot''; jobs our employees now have will be lost''), *Cowin & Co*., 277 NLRB 802 (1985) (statement at outset of negotiations by Employer,'' a real question of whether we shall be in business at the termination of this contract unless prior contractual concepts are radically changed''). *Coast Engraving Co*., 282 NLRB 1236 (1987) (statement by negotiator that if needed a wage freeze, ''in order to stay in business and recoup some bad losses they had [in] the first few months of the year)''; *Armored Transport*, supra (letter from employer to employees that it ''can no longer pay its employees from two to seven dollars more per hour than the competitors who are taking our business and your jobs.'') *American Model*, supra (can't afford to pay existing wages and benefits); *Facet Enterprises*, 290 NLRB 152 (1988) (plants might not survive without concessions from Union); *Gas Spring Co*., 296 NLRB 84 (1989) (employer claimed profits were declining, ''the bottom line is red,'' could not afford increases, jobs would be lost); *Taylor*, supra at 205 (statement by employer, ''if we so increased our labor costs that we would lose a margin of profit that we have and we can't exist''). See also *Celotex*, supra, 364 F.2d at 553–554 (statement by employer that concessions were necessary to make the plant competitive and ensure the plant's survival). See also Judge Burger's opinion in *Stanley Building*, supra, where in observing that claims of the need to be competitive have been equated to claims of inability to pay, also relied on claims by the employer ''that the money to pay for the union's proposal just wasn't there.'' 401 F.2d at 436.

On the other hand, in a number of other cases, the Board has found that the statements of employers, in the context of claims of competitive disadvantage, were not sufficient to amount to an inability to pay. *Craig & Hamilton Meat Co*., 271 NLRB 853, 856 (1984) (assertion by employer that its competitors would force it to change its operations from processor to jobber, thereby changing its labor needs. Moreover, Employer claimed that it would not ''be another of 800,000 business casualties,'' but the Board viewed this remark as not putting its general financial condition in issue, but only referring to the potential redirection of its resources from processing to jobbing); *E. I. du Pont*, supra (concerns expressed during negotiations that certain departments were economically unhealthy, but these remarks not tied to job restructuring proposed by employer which it claims would ''strengthen competitiveness''); *Buffalo Concrete*, supra (references by employer to general loss of jobs in the unionized section of the industry); *Gilberton Coal Co*., 291 NLRB 344 (1988) (statements by employer that coal market was shrinking, it needed greater flexibility, and that without changes ''it would waste away''); *Robinson Bus Service Co*., 292 NLRB 70 (1988) (employer had lost previous contract by being underbid; needed wage cuts to cut costs in order to bid successfully for routes in the upcoming school year.)

In *NLRB v. Nielsen Lithographers Co*., 854 F.2d 1063. 1065 (7th Cir. 1980), Judge Posner's opinion, while refusing to enforce the Board's Order in that case, supplied in my view an excellent analysis of the rationale for consideration of the need to be competitive vis a vis *Truitt* obligations, which underlines the Board's current position.

> In *NLRB v. Truitt Mfg. Co*., 351 U.S. 149, 76 S.CT. 753, 100 L.ED. 1027 (1956), the Supreme Court held that it is an unfair labor practice for an employer who

[5] I note, however, that later on in the decision, the court pointed out that the Board's counsel cited Judge Burger's opinion cited above in *United Steelworkers* enfg. *Stanley Building*, supra, for the proposition that a claim of competitive disadvantage was necessarily a claim of inability to pay. Id. at 575.

claims to be financially incapable of paying a wage increase requested by a union to refuse to let the union see the employer's books for purposes of verifying its claim. Otherwise labor negotiations would involve an even greater element of bluff, guesswork, and sheer gambling than they inevitably do, because the union would be put to the Hobson's choice of acceding to a quite possibly exaggerated claim of poverty or risking its members' jobs. The Court didn't think that forcing the union to play Russian roulette was the epitome of good faith bargaining.

Nielsen, however, never claimed that it was unable to pay the existing scale of wages and benefits. It admitted to being profitable but said it wanted to bring its wage bill into line with the wages paid by competitors to whom it was losing sales. A company can survive, certainly in the short run and often in the long run, even though it is paying higher wages than its competitors. The company may have some other cost advantage; its competitors may price above their costs; the market may be expanding rapidly. The company will grow less rapidly than if its costs were lower and may stagnate or decline, but it need not die. There is thus no contradiction in a company's stating on the one hand that its costs costs are higher than its competitors' and it wants to reduce them. The Board concedes that if this is all Nielsen said, Nielsen had no duty to open its books to the union. See *Washington Materials, Inc. v. NLRB*, 803 F.2d 1333, 1338–39 (4th Cir. 1986) (but see *NLRB v. Western Wirebound Box Co.*, 356 F.2d 88, 91 (9th Cir. 1966), which held that an employer's claim of competitive disadvantage required the employer, on the union's demand, to present substantiating data). A need is objective; it can be substantiated. But how do you substantiate a want? If a company says it wants to make higher profits by reducing its labor costs, what data would falsify its statement?

The Board found, however, that Nielsen had done more than express a desire for lower costs and higher profits; that it had said the wage cuts were necessary if the company was to remain competitive and reverse a trend of losing business to lower cost competitors. The company's president had told the workers that ''to survive we must be able to compete. Our business . . . and jobs are at stake if we can not . . . if we don't [compete] the recent trend of losing even greater amounts of work to other companies will continue and the jobs of our employees will be lost.'' The Board held that this statement, and others like it, were sufficient under *Truitt* to create a duty of substantiation. Cf. *Armored Transport of Calif., Inc.*, 288 NLRB No. 70 (2988) [sic].

This is not an irrational extension of *Truitt*. A rational businessman is concerned with the long run as well as the short run. He wants to maximize the present value of his company's earnings; and if the company has a dismal future, its expected further earnings, and hence its present value, will be depressed as a result. An employer that in negotiations with its union claims that its wages are out of line with those of its competitors and as a result its future is bleak-however rosy the present may seem-makes a serious and factual claim, one that if true must cause the union to give serious consideration to making the concessions the employer is demanding, or at least making some concessions. Informed bargaining over the issue requires that the union have access to the data from which the company has projected its bleak future.

Thus while seeming to approve the Board's reasoning in *Nielsen*, supra, the court nonetheless refused to enforce the Board's Order in view of the intervening Seventh Circuit opinion in *Harvstone*, supra. That decision (785 F.2d 570) in a case similar to *Nielsen*, as noted, held contrary to the Board's view, that predictions that a business will falter are nothing more than ''truisms'' and do not trigger a duty of disclosure under *Truitt*, since it did not necessarily in the Court's view plead an inability to pay during the term (ordinarily 3 years) of the new collective-bargaining agreement being negotiated. Judge Posner's opinion, criticized the Board for its failure to discuss *Harvstone* and its implications to *Nielsen*, supra, notwithstanding a request by Nielsen for reconsideration based on the *Harvstone* reversal by the circuit.

Accordingly, the court refused to enforce the *Nielsen* order, but interestingly remanded the case to the Board, so that it could either distinguish *Harvstone*, state that it disagreed with *Harvstone* and was adhering to its own view,[6] or perhaps convince the court to reexamine *Harvstone*. Indeed, my reading of Judge Posner's opinion, as reflected particularly in the above-cited quotation appears to suggest that he would be receptive to reexamining the court's *Harvstone* decision.

As of this date, the Board has not as yet issued its decision on the *Nielsen* remand, so it cannot be determined which of the options, if any, Judge Posner outlined, the Board will choose. In any event, since my decision is controlled by Board precedent, unless overruled by the Supreme Court, *Gas Spring Co.*, supra, and cases cited therein, I am not bound by the *Harvstone* rationale nor the *Nielsen* refusal to enforce the Board's Order. Thus, the Board decisions in *Harvstone* and *Nielsen* which reflect the Board's view that a claim of competitive disadvantage coupled with predictions that such lack of competitiveness would or will result in financial distress for the employer is the type of assertion that *Truitt* requires be substantiated; and is the standard that I must apply in assessing the Respondent's position herein. See *Facet*, supra; *Gas Springs*, supra; *Armored Transport*, supra.

The key factor in evaluating claims made in this regard is whether the Employer is merely asserting generalized claims about the economy and/or its relationship to its competitors, in which case, an unwillingness rather than an inability to pay is established, and no violation is warranted. *Robinson Bus*, supra; *Buffalo Concrete*, supra, *Atlantic Hilton*, supra. On the other hand, where an employer in asserting its need to be competitive, also relies upon its own financial condition and/or its projection of economic hardship, then it is pleading an inability to pay, and must produce financial in-

[6] Note that as described below, and as conceded in *Nielsen* by the Seventh Circuit, most other circuits have agreed with the Board's view in this area.

formation to support its claim. *Gas Springs*, supra; *Facet*, supra, *Clemson Bros*., supra.

Turning to the facts of the instant case, I am persuaded that Respondent has coupled its asssertion of competitive disadvantage with sufficient additional statements referring to its own present and future financial distress to warrant an obligation under *Truitt* to support its claims by disclosing financial information to the Union.

Most significantly, I note the statement made by Burruss at the last negotiation session, and incidentially the session prior to the Union's request for financial information. In explaining Respondent's need to be competitive as justification for its refusal to agree to any increases in wages or benefits, Burruss explained that if he had to pay $98 for equipment and crew, while his competition paid only $95 for the same equipment and crew, he would ''not be able to survive.'' This type of statement by employers has long been considered a projection of economic distress as a result of being noncompetitive, which amounts to a plea of inability to pay. *Facet*, supra; *Gas Springs*, supra; *Nielsen*, supra; *Corwin*, supra; *Taylor*, supra; see also *Mashkin Freight Lines*, 272 NLRB 427, 435 (1984), where an assertion that an employer needed reductions if it was to survive, was sufficient, even absent a claim of noncompetitiveness, to require disclosure of financial information under *Truitt.*

Second, at the August 11 negotiation session, the parties were discussing the Union's Health and Welfare Plan. Burruss indicated that he liked the Union's plan and thought it was a good plan, but he ''didn't feel that he could afford to pay that,'' adding that he was already paying a 67-percent surcharge for Workmen's Compensation Insurance. This remark of Burruss is also a strong indication of Respondent's inability rather than an unwillingness to agree to the Union's proposed Health Benefits. Cf. *Atlanta Hilton*, supra; and further demonstrative of a plea of inability to pay under *Truitt*. *Celotex*, supra at 54; *American Model*, supra at 184; *Gas Spring*, supra; *Stamco Division*, 227 NLRB 1265, 1267–1268 (1977).

Additionally, Burruss in justifying his refusal to meet the Union's wage demands, repeatedly stated that in order to remain competitive, his proposal was the best that they ''could do.'' This remark is another indication of an inability rather than an unwillingness to pay. See *New York Printing Pressman*, supra, 538 F.2d 500, where the Second Circuit concluded that a statement by an employer that he ''couldn't reach'' the Union's wage proposals was a sufficient indication of financial inability rather than an unwillingness to meet the Union's demands.

During that same meeting, Augst asserted that a financial report prepared by the Union's economics department on Respondent, demonstrated that Respondent could meet the Union's demands, because the report reflected that Respondent was doing well and showed growth. In reply, Burruss repeated his assertion that his proposal was the best he could do in order to remain competitive in the area. Burruss, however, added that he felt that the Union had probably gotten its information from Dun & Bradstreet, because if the Union had gotten Respondent's credit report, ''it would have painted a different picture.'' In my view, Respondent by this statement of Burruss is putting in issue the present financial condition of Respondent's operations, an assertion that must be substantiated under *Truitt*, *Clemson*, supra. See *American Model*, supra at 184; see also *NLRB v. Unoco Apparel, Inc*., 508 F.2d 1369, 1370 (5th Cir. 1975) (statement by employer ''the employees came to the wrong well . . . . the well is dry'').

Accordingly, based on the above analysis and authorities, I conclude that Respondent has asserted an inability rather than an unwillingness to meet the Union's demands, and is obligated under *Truitt* to supply the information requested by the Union, in order to document and support these assertions.

The General Counsel also relies on the conversation between Burruss and Kirchgraber in September 1989 to support the claim that Respondent was pleading an inability to pay, during the subsequent bargaining. Respondent asserts that this conversation is irrelevant and should not be considered, since it occurred months before the negotiations commenced, and Kirchgraber was not at the time an agent of the Union.

Although, as I have noted above, I conclude that even absent consideration of this conversation, Respondent has pled an inability to pay, I am in agreement with the General Counsel that it is appropriate to consider the statements made by Barruss to Kirchgraber in assessing what Respondent meant by its positions stated during bargaining. The Board has consistently relied upon communications between employers and employees, outside the negotiations, in order to evaluate positions taken by employers at the table. *Facet*, supra; *Armored Transport*, supra at 575–576; *Nielsen*, supra at 879; *Stanley Building*, supra at 985–986. Although the negotiations had not started at the time of the conversation, the Board has specifically held, ''we do not read the Supreme Court's holding in *NLRB v. Truitt Mfg*., 351 U.S. 149, as precluding an inquiry into Respondent's conduct before negotiations have commenced or before the Union has had its complete economic proposals on the bargaining table.'' *Stanley Building*, supra at 985–986.

Therefore, I find that it is appropriate to evaluate Burruss' remarks to Kirchgraber, insofar as they reflect on any ambiguity as to Respondent's bargaining position expressed at the table. These statements, emphasizing Respondent's lack of profit, and emphatically asserting that it could not afford to pay employees more than it was currently stating, clearly demonstrated an inability to pay position. Moreover, the assertion that Respondent would be agreeable to open its books and show the Union that it could not afford to pay any more, but that its lawyer recommended against it, further underscores such a conclusion. Respondent's position is akin to an attempt to have ''its cake and eat it.''

Thus, Burruss after speaking to his attorney about bargaining strategy, seeks out an employee, clearly one who he perceives to be a leader of the union drive,[7] and tells the employee that Respondent cannot afford to pay any more than it was currently paying. Burruss also tells the employee not to tell the Union about the conversation, suspecting and in my mind, hoping, that the employee probably will do so. Then Burruss adds that he would be willing to show his books to the Union, to support this assertion, but his attorney advises against it. Thus, Respondent is attempting to get the message across to the Union indirectly that it cannot afford to pay any more, while trying to avoid making such a claim

[7] This assumption by Burruss was borne out by subsequent events, since Kirchgraber was eventually selected as the sole employer bargaining committee member.

at the bargaining table, so as to avoid the obligation to open up his books.[8] This disingenuous position is not good-faith bargaining. Therefore, I conclude that it is appropriate to consider the statements made by Burruss to Kirchgraber, which serve to reinforce and clarify the position taken by Respondent at the table that it was unable to pay the increases and benefits demanded by the Union.

Respondent alleges as an affirmative defense that the complaint allegation is barred by Section 10(b) of the Act. Respondent relies on *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411, 416 (1960), and argues that since only the refusal to supply the information herein, occurred within the 10(b) period, the violation cannot be proved without reliance on pre 10(b) events. Thus, Respondent contends that the refusal to supply the information itself is made unlawful only by reference to the pleas of inability of pay, which were all outside the 10(b) period. Therefore, Respondent cites that portion of Bryan which holds that in such circumstances, the pre-10(b) evidence ''serves to cloak with illegality that which was otherwise lawful.'' I do not agree.

In request for information cases, the 10(b) period begins to run form the date of the employer's refusal to provide the information. *New Jersey Bell Telephone Co*., 289 NLRB 318 (1988); *Borden Chemical*, 261 NLRB 64, 74 (1982). The opinion of *Bryan*, supra, which provides that earlier events may be utilized to shed light on the character of matters occurring within the limitation period is clearly applicable to this situation. Indeed, frequently the Board considers events over a long period of time, well outside the 10(b) period, during the bargaining process to evaluate whether a refusal to supply information, inside the 10(b) period, is unlawful. See, e.g., *Armored Transport*, supra.

Therefore, I reject Respondent's argument that the complaint is time barred by Section 10(b) of the Act.

Accordingly, based on the foregoing analysis and citation of authorities, I conclude that Respondent has violated Section 8(a)(1) and (5) of the Act by refusing on and after February 27, 1989, to supply the Union with the information requested in its September 19 letter.

B. *The Alleged Bypassing of the Union and Unilateral Grant of a Wage Increase*

It is undisputed that in February 1990, employee Robert Spry and Burruss discussed Spry's request for a wage increase, and Respondent without notifying or bargaining with the Union, granted Spry a raise shortly thereafter.

Since the Union was still the collective-bargaining representative of Respondent's employees at the time, Respondent was not free to discuss wages directly with its employees, and its action in this regard violates Section 8(a)(1) and (5) of the Act. *Medo Photo Supply Co. v. NLRB*, 321 U.S. 678 (1944); *Billion Oldsmobile Toyota*, 260 NLRB 745, 754 (1982).

Turning to the granting of a raise to Spry, it is well settled that an employer violates Section 8(a)(1) and (5) of the Act, when it unilaterally changes terms and conditions of employment, such as granting a wage increase, without providing the collective-bargaining representative a meaningful opportunity to bargain about such changes. *NLRB v. Katz*, 369 U.S. 736, 741–743, 747 (1962); *Alamo Cement Co*., 281 NLRB 737, 738 (1986).

Respondent is permitted to grant such an increase if an impasse existed, or if the Union has waived its right to bargain about the action. *Cliffside Health Center*, 279 NLRB 1126, 1127 (1986).

In order to establish a waiver of the Union's rights to notice and bargaining about the wage increases, Respondent must demonstrate by clear and unmistakable evidence that the Union either by contract or during negotiations has expressly waived its rights. *Statler Hilton Hotel*, 191 NLRB 283, 288 (1971), and cases cited therein.

Respondent does not contend, nor does the evidence establish the existence of an impasse when Respondent granted the increase. However, Respondent does contend that Spry received the increase in light of his positive record and his many out of town trips, and that Respondent was privileged to give Spry the raise because of the proposed contract clause allowing such an increase. *Johnson Bateman Co*., 295 NLRB 180 (1988). Respondent's contentions are without merit.

As for the assertion that Spry's increase was in effect well deserved or based on legitimate considerations, this is no defense, since good faith is irrelevant to this allegation. *American Chain & Link Fence Co*., 255 NLRB 692, 699 (1981).

Respondent's second argument, in effect contending that the Union waived its right to bargain because of the proposed contract clause, has not been substantiated, and his reliance on *Johnson Bateman*, supra, in that regard is misplaced. While it is true that the clause in *Johnson Bateman* considered to have waived the Union's rights therein, is similar to the clause in this case, Respondent conveniently ignores one crucial difference. That is in *Johnson Bateman* the clause had been agreed to by the Union and was incorporated in the collective-bargaining agreement between the parties. Here no contract was ever agreed to between the parties, and no evidence was adduced that the clause was even tentatively agreed to by the Union during negotiations. Indeed, even had the Union tentatively agreed to the clause during negotiations, in the absence of an overall agreement on all terms of the contract, such agreement on the clause in question would not be sufficient to meet the stringent test of establishing a ''clear and unmistakable waiver.''

Accordingly, having rejected all of Respondent's defenses, it follows that Respondent has violated Section 8(a)(1) and (5) of the Act by granting a wage increase to Spry. I so find.

REMEDY

Having found that Respondent has violated Section 8(a)(1) and (5) of the Act, I shall recommend that it cease and desist therefrom, and take certain affirmative action necessary to effectuate the purposes and policies of the Act. I shall recommend that it be ordered to furnish the Union the information requested in its letter of September 19, 1989.

CONCLUSIONS OF LAW

1. Respondent, Burruss Transfer, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[8] Indeed, Burruss' conversation with Kirchgraber could be construed as unlawful direct bargaining in derogation of the Union's status. I make no such finding, however, since it has not been alleged, and in any event would be barred by Sec. 10(b) of the Act.

2. Local Union 65, affiliated with the International Brotherhood of Teamsters, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Since on or about September 14, 1988, the Union has been and continues to be at all times material herein, the exclusive representative of the employees of Respondent for the purposes of collective bargaining under Section 9(a) of the Act, in the following appropriate unit:

> All full-time and regular part-time local drivers, local driver helpers, short haul drivers, short haul drivers helpers, packers, warehousemen, and any other employees who perform such work, employed by the Respondent at its Route 13 and Lower Creek Road, Ithaca, New York location, excluding office clerical employees, confidential employees, the dispatcher, mechanics, casual employees, guards, supervisors and all other employees excluded under the National Labor Relations Act.

4. By refusing on and after September 27, 1989, to furnish the Union with the information requested in the Union's letter of September 19, 1989, Respondent has violated Section 8(a)(1) and (5) of the Act.

5. By bargaining directly with and granting a wage increase to employee Robert Spry in February 1990, Respondent has violated Section 8(a)(1) and (5) of the Act.

6. The aforementioned unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]